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ALAMEDA COUNTY

CLERK OF THE SUPERIOR COURT
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

ENVIRONMENTAL RESEARCH
CENTER, INC.,

Plaintiff,

v.

VEVMA NUTRITION COMPANY,

Defendant.

Case No. **RG12627120**

**COMPLAINT FOR INJUNCTIVE
RELIEF AND CIVIL PENALTIES**

[Health & Safety Code §25249.5, *et seq.*]

Plaintiff Environmental Research Center, Inc. brings this action in the interests of the general public and, on information and belief, hereby alleges:

INTRODUCTION

1. This action seeks to remedy Defendant's continuing failure to warn consumers in California that they are being exposed to lead, a substance known to the State of California¹ to cause cancer, birth defects and other reproductive harm.

2. Defendant has manufactured, packaged, distributed, marketed, sold and/or has otherwise been involved in the chain of commerce of, and continues to manufacture, package, distribute, market, sell and/or otherwise continues to be involved in the chain of commerce of the following ingestible products, which contain the chemical lead and which have been and continue to be offered for sale, sold and/or otherwise provided for use and/or handling to individuals in California:

¹ All statutory and regulatory references herein are to California law, unless otherwise specified.

- a. New Vision Cleanse, Burn & Balance.
- b. New Vision OPC Grape Seed Extract.
- c. New Vision Organics Greens Green Apple Flavor.

These listed products are hereinafter referred to together as "THE PRODUCTS".

3. The use and/or handling of THE PRODUCTS causes exposures to lead at levels requiring a "clear and reasonable warning" under California's Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety Code ("H&S Code") §25249.5, *et. seq.* (also known as "Proposition 65"). Defendant has failed to provide the health hazard warnings required by Proposition 65.

4. The continued manufacturing, packaging, distributing, marketing and/or sales of THE PRODUCTS without the required health hazard warnings, causes individuals to be involuntarily and unwittingly exposed to levels of lead that violate Proposition 65.

5. Plaintiff seeks injunctive relief enjoining Defendant from the continued manufacturing, packaging, distributing, marketing and/or selling of THE PRODUCTS for sale or use in California without first providing clear and reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer, birth defects and other reproductive harm posed by exposure to lead through the use and/or handling of THE PRODUCTS. Plaintiff seeks an injunctive order compelling Defendant to bring its business practices into compliance with Proposition 65 by providing clear and reasonable warnings to each individual who may be exposed to lead from the use and/or handling of THE PRODUCTS.

6. In addition to injunctive relief, Plaintiff seeks an assessment of civil penalties to remedy Defendant's failure to provide clear and reasonable warnings regarding exposures to the lead.

JURISDICTION AND VENUE

7. This Court has jurisdiction over this action pursuant to California Constitution Article VI, Section 10, which grants the Superior Court "original jurisdiction in all causes except those given by statute to other trial courts." The statute under which this action is brought does not specify any other basis for jurisdiction.

8. This Court has jurisdiction over Defendant because, based on information and belief, Defendant is a business having sufficient minimum contacts with California, or otherwise

1 intentionally availing itself of the California market through the marketing, distribution and/or
2 sale of THE PRODUCTS in the State of California to render the exercise of jurisdiction over it
3 by the California courts consistent with traditional notions of fair play and substantial justice.

4 9. This Court is the proper venue for this action because the Defendant has violated
5 California law in the County of Alameda. Furthermore, this Court is the proper venue under
6 Code of Civil Procedure §395.5 and H&S Code §25249.7(a), which provides that any person
7 who violates or threatens to violate H&S Code §§25249.5 or 25249.6 may be enjoined in any
8 court of competent jurisdiction.

9 PARTIES

10 10. Plaintiff Environmental Research Center, Inc. ("ERC") is a non-profit corporation
11 organized under California's Non-Profit Benefit Corporation Law. ERC is dedicated to, among
12 other causes, reducing the use and misuse of hazardous and toxic substances, consumer
13 protection, worker safety and corporate responsibility.

14 11. ERC is a person within the meaning of H&S Code §25118 and brings this
15 enforcement action in the public interest pursuant to H&S Code §25249.7(d).

16 12. Defendant VEMMA NUTRITION COMPANY is an Arizona corporation that is
17 registered to do business in California, thus is a person within the meaning of H&S Code
18 §25249.11(a). Defendant VEMMA NUTRITION COMPANY has manufactured, packaged,
19 distributed, marketed, sold and/or have otherwise been involved in the chain of commerce, and
20 continue to manufacture, package, distribute, market, sell and/or otherwise continue to be
21 involved in the chain of commerce of THE PRODUCTS for sale or use in California. VEMMA
22 NUTRITION COMPANY employs ten or more persons, and is thus a "person in the course of
23 doing business" within the meaning of Proposition 65.

24 STATUTORY BACKGROUND

25 13. The People of the State of California have declared in Proposition 65 their right
26 "[t]o be informed about exposures to chemicals that cause cancer, birth defects, or other
27 reproductive harm." (Section 1(b) of Initiative Measure, Proposition 65).

28 14. To effect this goal, Proposition 65 requires that individuals be provided with a
"clear and reasonable warning" before being exposed to substances listed by the State of
California as causing cancer or reproductive toxicity. H&S Code §25249.6 states, in pertinent

1 part:

2 No person in the course of doing business shall knowingly and intentionally
3 expose any individual to a chemical known to the state to cause cancer or
4 reproductive toxicity without first giving clear and reasonable warning to
such individual....

5 15. Proposition 65 provides that any person who "violates or threatens to violate" the
6 statute "may be enjoined in any court of competent jurisdiction." (H&S Code §25249.7(a).)
7 "Threaten to violate" is defined to mean creating "a condition in which there is a substantial
8 probability that a violation will occur." (H&S Code §25249.11(e).) Violators are liable for civil
9 penalties of up to \$2,500 per day for each violation of Proposition 65. (H&S Code §25249.7(b).)

10 **FACTUAL BACKGROUND**

11 16. On February 27, 1987, the State of California officially listed the chemical lead as
12 a chemical known to cause developmental and reproductive toxicity. Lead became subject to the
13 warning requirement one year later and was therefore subject to the "clear and reasonable"
14 warning requirements of Proposition 65 beginning on February 27, 1988. (27 California Code of
15 Regulations ("CCR") §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

16 17. On October 1, 1992, the State of California officially listed the chemical lead as a
17 chemical known to cause cancer. Lead became subject to the warning requirement one year later
18 and was therefore subject to the "clear and reasonable" warning requirements of Proposition 65
19 beginning on October 1, 1993. (27 CCR §25000, *et seq.*; H&S Code §25249.5, *et seq.*)

20 18. Plaintiff is informed and believes, and based on such information and belief,
21 alleges THE PRODUCTS have been marketed, distributed and/or sold to individuals in
22 California without the requisite clear and reasonable warnings before, on, and after September
23 13, 2009. THE PRODUCTS continue to be marketed, distributed and sold in California without
the requisite warning information.

24 19. As a proximate result of acts by Defendant, as a person in the course of doing
25 business within the meaning of H&S Code §25249.11(b), individuals throughout the State of
26 California, including in the County of Alameda, have been exposed to lead without clear and
27 reasonable warnings. The individuals subject to exposures to lead include normal and
28 foreseeable users of THE PRODUCTS, as well as all other persons exposed to THE
PRODUCTS.

1 20. At all times relevant to this action, Defendant has knowingly and intentionally
2 exposed the users and/or handlers of THE PRODUCTS to lead without first giving clear and
3 reasonable warnings to such individuals.

4 21. Individuals using or handling THE PRODUCTS are exposed to lead in excess of
5 the "maximum allowable daily" and "no significant risk" levels determined by the State of
6 California, as applicable.

7 22. At all times relevant to this action, Defendant has, in the course of doing business,
8 failed to provide individuals using and/or handling THE PRODUCTS with clear and reasonable
9 warnings that THE PRODUCTS expose individuals to lead.

10 23. THE PRODUCTS continue to be marketed, distributed, and/or sold in California
11 without the requisite clear and reasonable warnings.

12 **FIRST CAUSE OF ACTION**

13 **(Injunctive Relief for Violations of Health and Safety Code §25249.5, *et seq.* concerning**
14 **THE PRODUCTS, which are identified in Plaintiff's September 13, 2010 60-Day Notice of**
15 **Violations)**

16 24. Plaintiff realleges and incorporates by reference Paragraphs 1 through 23,
17 inclusive, as if specifically set forth herein.

18 25. On September 13, 2010, Plaintiff sent a 60-Day Notice of Proposition 65
19 violations to the requisite public enforcement agencies and to Defendant VEMMA NUTRITION
20 COMPANY ("Notice of Violations"). THE PRODUCTS were identified in the Notice of
21 Violations as containing lead exceeding allowable levels. The Notice of Violations was issued
22 pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the
23 statute's implementing regulations regarding the notice of violations to be given to certain public
24 enforcement agencies and to the violator. The Notice of Violations was issued as follows:

- 25 a. Defendant VEMMA NUTRITION COMPANY and the California
26 Attorney General were provided copies by Certified Mail of the Notice of
27 Violations, along with a Certificate of Merit by the attorney for the
28 noticing party stating that there is a reasonable and meritorious cause for
 this action. The requisite county district attorneys and city attorneys were
 provided copies by First Class Mail of the Notice of Violations and
 Certificate of Merit.

- 1 b. Defendant VEMMA NUTRITION COMPANY was provided, with the
2 Notice of Violations, a copy of a document entitled "The Safe Drinking
3 Water and Toxic Enforcement Act of 1986 (Proposition 65): A
4 Summary," which is also known as Appendix A to Title 27 of CCR
5 §25903.
- 6 c. The California Attorney General was provided, with the Notice of
7 Violations, additional factual information sufficient to establish a
8 basis for the Certificate of Merit, including the identity of the persons
9 consulted with and relied on by the certifier, and the facts, studies, or other
10 data reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1)
11 and 25249.7(h)(2).

12 26. The appropriate public enforcement agencies have failed to commence and
13 diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendant
14 based on the allegations herein.

15 27. By committing the acts alleged in this Complaint, Defendant at all times relevant
16 to this action, and continuing through the present, has violated and continues to violate H&S
17 Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing
18 individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding
19 allowable exposure levels without Defendant first giving clear and reasonable warnings to such
20 individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendant has manufactured,
21 packaged, distributed, marketed, sold and/or has otherwise been involved in the chain of
22 commerce of, and continues to manufacture, package, distribute, market, sell and/or otherwise
23 continues to be involved in the chain of commerce of THE PRODUCTS, which have been, are,
24 and will be used and/or handled by individuals in California, without Defendant providing clear
25 and reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer,
26 birth defects and other reproductive harm posed by exposure to lead through the use and/or
27 handling of THE PRODUCTS. Furthermore, Defendant has threatened to violate H&S Code
28 §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided
 for use and/or handling to individuals in California.

 28. By the above-described acts, Defendant has violated H&S Code §25249.6 and is
 therefore subject to an injunction ordering Defendant to stop violating Proposition 65, and to

1 provide required warnings to consumers and other individuals who will purchase, use and/or
2 handle THE PRODUCTS.

3 29. An action for injunctive relief under Proposition 65 is specifically authorized by
4 Health & Safety Code §25249.7(a).

5 30. Continuing commission by Defendant of the acts alleged above will irreparably
6 harm the citizens of the State of California, for which harm they have no plain, speedy, or
7 adequate remedy at law.

8 Wherefore, plaintiff prays judgment against Defendant, as set forth hereafter.

9 **SECOND CAUSE OF ACTION**

10 (Civil Penalties for Violations of Health and Safety Code §25249.5, *et seq.* concerning THE
11 PRODUCTS, which are identified in Plaintiff's September 13, 2010 60-Day Notice of
12 Violations)

13 31. Plaintiff realleges and incorporates by reference Paragraphs 1 through 30,
14 inclusive, as if specifically set forth herein.

15 32. On September 13, 2010, Plaintiff sent a 60-Day Notice of Proposition 65
16 violations to the requisite public enforcement agencies and to Defendant VEMMA NUTRITION
17 COMPANY ("Notice of Violations"). THE PRODUCTS were identified in the Notice of
18 Violations as containing lead exceeding allowable levels. The Notice of Violations was issued
19 pursuant to, and in compliance with, the requirements of H&S Code §25249.7(d) and the
20 statute's implementing regulations regarding the notice of violations to be given to certain public
21 enforcement agencies and to the violator. The Notice of Violations was issued as follows:

- 22 a. Defendant VEMMA NUTRITION COMPANY and the California
23 Attorney General were provided copies by Certified Mail of the Notice of
24 Violations, along with a Certificate of Merit by the attorney for the
25 noticing party stating that there is a reasonable and meritorious cause for
26 this action. The requisite county district attorneys and city attorneys were
27 provided copies by First Class Mail of the Notice of Violations and
28 Certificate of Merit.
- b. Defendant VEMMA NUTRITION COMPANY was provided, with the
Notice of Violations, a copy of a document entitled "The Safe Drinking
Water and Toxic Enforcement Act of 1986 (Proposition 65): A

Summary,” which is also known as Appendix A to Title 27 of CCR §25903.

- c. The California Attorney General was provided, with the Notice of Violations, additional factual information sufficient to establish a basis for the Certificate of Merit, including the identity of the persons consulted with and relied on by the certifier, and the facts, studies, or other data reviewed by those persons, pursuant to H&S Code §§25249.7(d)(1) and 25249.7(h)(2).

33. The appropriate public enforcement agencies have failed to commence and diligently prosecute a cause of action under H&S Code §25249.5, *et seq.* against Defendant based on the allegations herein.

34. By committing the acts alleged in this Complaint, Defendant at all times relevant to this action, and continuing through the present, has violated and continues to violate H&S Code §25249.6 by, in the course of doing business, knowingly and intentionally exposing individuals who use or handle THE PRODUCTS to the chemical lead at levels exceeding allowable exposure levels without Defendant first giving clear and reasonable warnings to such individuals pursuant to H&S Code §§25249.6 and 25249.11(f). Defendant has manufactured, packaged, distributed, marketed, sold and/or has otherwise been involved in the chain of commerce of, and continues to manufacture, package, distribute, market, sell and/or otherwise continues to be involved in the chain of commerce of THE PRODUCTS, which have been, are, and will be used and/or handled by individuals in California, without Defendant providing clear and reasonable warnings, within the meaning of Proposition 65, regarding the risks of cancer, birth defects and other reproductive harm posed by exposure to lead through the use and/or handling of THE PRODUCTS. Furthermore, Defendant has threatened to violate H&S Code §25249.6 by THE PRODUCTS being marketed, offered for sale, sold and/or otherwise provided for use and/or handling to individuals in California.

35. By the above-described acts, Defendant is liable, pursuant to H&S Code §25249.7(b), for a civil penalty of \$2,500 per day for each violation of H&S Code §25249.6 relating to THE PRODUCTS.

Wherefore, plaintiff prays judgment against Defendant, as set forth hereafter.

36. Plaintiff realleges and incorporates by this reference Paragraphs 1 through 35, inclusive, as if specifically set forth herein.

PRAYER FOR RELIEF

A. A preliminary and permanent injunction enjoining Defendant, its agents, employees, assigns and all persons acting in concert or participating with Defendant, from manufacturing, packaging, distributing, marketing and/or selling THE PRODUCTS for sale or use in California without first providing clear and reasonable warnings, within the meaning of Proposition 65, that the users and/or handlers of THE PRODUCTS are exposed to the lead;

E. Such other and further relief as may be just and proper.

LAW OFFICE OF PHILIP T. EMMONS

Wm. J. Egan

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Environmental Research Center, Inc.